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NO. 90-968

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

STATE OF NORTH CAROLINA,

Petitioner,

v.

LEROY McNEIL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

DID THE SENTENCING INSTRUCTIONS CREATE A REASONABLE LIKELIHOOD THAT THE SENTENCING JURY BELIEVED INDIVIDUAL JURORS COULD NOT WEIGH AND CONSIDER MITIGATING EVIDENCE NOT FOUND BY THE JURY AS A GROUP TO SUPPORT A MITIGATING FACTOR?

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Respondent, Leroy McNeil, respectfully opposes and requests this Court to deny the Petition for Writ of Certiorari filed by petitioner seeking review of the decision by the Supreme Court of North Carolina. *See State v. McNeil*, 327 N.C. 388, 395 S.E.2d 106 (1990).

OPINION BELOW

JURISDICTION

CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS

STATEMENT OF THE CASE

Pursuant to Rules 15.2 and 24.2, these items are omitted since respondent is satisfied with petitioner's statements of the OPINION BELOW, JURISDICTION, CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS, AND STATEMENT OF THE CASE.

REASONS WHY A WRIT SHOULD NOT ISSUE

A reasonable likelihood exists that respondent's capital sentencing jury applied the trial court's instructions in a way that prevented the consideration of constitutionally relevant mitigating evidence. *Boyde v. California*, 494 U.S. ____, ____, 108 L.Ed.2d 316, 329 (1990). In dutifully performing its review of this case after this Court remanded it for reconsideration, *see McNeil v. North Carolina*, 494 U.S. ____, 108 L.Ed.2d 756 (1990), the lower court painstakingly applied the relevant decisions of this Court to "conclude that when viewed in the context of the overall charge, there is a reasonable likelihood that the jury interpreted the instructions here to require unanimity as to mitigating circumstance." *State v. McNeil*, 327 N.C. 388, 393, 395 S.E.2d 106, 110 (1990) (relying upon *Boyde v. California*, 494 U.S. ____, 108 L.Ed.2d 316 (1990); *McKoy v. North Carolina*, 494 U.S. ____, 108 L.Ed.2d 369 (1990); *Mills v. Maryland*, 486 U.S. 367 (1988)). Petitioner does not and, indeed, cannot contend that the lower court failed to

apply the appropriate constitutional standards as interpreted by the prevailing decisions of this Court. Rather, petitioner merely disagrees with the lower court's fact-bound assessment of how a reasonable North Carolina jury would have understood these particular sentencing instructions. Petitioner presents no significant question of constitutional importance either to capital punishment jurisprudence generally or to North Carolina's capital punishment practices specifically. As petitioner acknowledges, the instructions given here were not the same as the pattern instructions given in *McKoy* or the new post-*McKoy* instructions. There being no significant issue worthy of this Court's review, the petition should be denied.

A. Respondent's Jury Likely Understood the Instructions to Require Unanimous Agreement on Mitigating Factors.

As this Cocurt knows, "in North Carolina's system, *each juror* must be allowed to consider all mitigating evidence in deciding issues Three and Four. . . ." *McKoy*, 494 U.S. at ____, 108 L.Ed.2d at 381 (emphasis added). Furthermore, the Eighth Amendment forbids instructions that a juror may reasonably interpret as requiring the entire jury to agree a mitigating circumstance exists before that circumstance may be considered for the purpose of sentencing. *Mills*, 486 U.S. at 376-78. *Mills* did not turn on the sentencing jury being told it had to agree unanimously a mitigating factor existed in order to find it. Rather, *Mills* hinged on the operation of the jury instructions, taken as a whole, in precluding any juror from considering evidence of a mitigating factor in her ultimate sentencing decision if that factor was not found by the jury as a whole. *Id.* at 384. In this case, the lower court properly concluded, applying the *Boyde* standard, that the instructions given at the close of respondent's sentencing hearing, taken as a whole, were reasonably likely to have been understood to require the jury to agree

unanimously that a mitigating circumstance had been proved before any juror could consider such mitigating evidence in the ultimate sentencing decision.

Unlike the procedures in many state capital punishment schemes, *see, e.g., Commonwealth v. Frey,* 520 Pa. 338, 347, 554 A.2d 27, 31 (1989) (Pennsylvania has no step in process where jury must find mitigating factors). *State v. Thompson*, 768 S.W.2d 239, 250-51 (Tenn. 1989) (Tennessee has no step like North Carolina's Issue Two), North Carolina has a step in its sentencing procedure where the jury is told to make findings as to whether specific mitigating factors have been proved by a defendant. Respondent's jury was told in Issue Two to determine whether one or more of five specific mitigating factors (as well as any other unspecified factors) had been proved. Appendix to Petition at A-48, A-49, A-52, A-53. Although the word "unanimously" does not appear in Issue Two, the trial court's final mandate to the sentencing jury stated, "Your decision, your answers to any of the issues as to your final recommendation must be unanimous, all twelve of you agree." Appendix to Petition at A-34. Respondent's jury would likely have understood this directive as requiring unanimous agreement as to the existence of mitigating circumstances. Had this mandate existed in isolation and not been underscored by subsequent instructions, its effect on the validity of respondent's death sentences might have been less obvious but no less unconstitutional. *E.g., Commonwealth v. Billa,* 521 Pa. 166, 555 A.2d 835 (1989) (finding one isolated mention of unanimity in the sentencing mandate violated *Mills*). But the trial court underscored this requirement of unanimity and applied it to every issue in the case through supplemental instructions at two points during the jury's sentencing deliberations. Appendix to Petition at A-39, A-40. Petitioner argues that "close scrutiny of the supplemental instructions in context shows that the court did not imply unanimity was required on Issue Two as to mitigating circumstances." Petition at 18. Unfortunately, respondent's jury did not have a written version of these instructions. It

did not have the opportunity to scrutinize carefully or parse through them for subtle shades of meaning. Respondent's jury could only apply "a common sense understanding of the instructions in light of all that [had] taken place at the trial . . . ." *Boyde*, 494 U.S. at ____, 108 L.Ed.2d at 329. It could not have engaged in "technical hairsplitting" by closely scrutinizing and "parsing instructions for subtle shades of meaning in the way lawyers might." *Id.* Hearing the instructions, there is a reasonable likelihood the jury would have understood them to apply to the consideration of mitigation at Issue Two. *Id.*

Furthermore, the only method for reaching any decision given to respondent's jury required a unanimous determination. Appendix to Petition at A-18, A-22, A-23, A-27, A-31, A-32, A-34. The Issues and Recommendation as to Punishment forms also contained the unanimity requirement for these determinations. *Id.* at A-47 to A-54. The instructions and verdict forms used in the guilt phase also told the jury to be unanimous in its decisions. Respondent's jury heard nothing at any point in the proceedings other than its decisions had to be unanimous. A North Carolina jury will understand its decisions must be unanimous, to the extent that "a judge is not even required to charge the jury in general about the need for a unanimous verdict . . . ." *State v. Sturdivant,* 304 N.C. 293, 305, 283 S.E.2d 719, 728 (1981). Any suggestion to the contrary is counter-intuitive.

This precise common sense understanding would cause respondent's jury, acting reasonably, to understand the instructions as requiring it to reach unanimous agreement before finding the existence of mitigation. This understanding was deemed "a settled principle" by the lower court long before respondent's trial. *State v. Kirkley,* 308 N.C. 196, 218, 302 S.E.2d 144, 157 (1983), *overruled on other grounds, State v. Shank,* 322 N.C. 243, 367 S.E.2d 639 (1988). Petitioner's hyper-technical reading of the instructions does

not dispel the lower court's conclusion that the jury's common sense understanding, coupled with the trial court's repeated references to unanimous determinations in its mandate and supplemental instructions, would not have led it to believe that a unanimous determination was required before a mitigating circumstance could be considered.

The North Carolina Supreme Court faithfully applied *Boyd*, *McKoy*, and *Mills*. Furthermore, its intimate familiarity with the instructions in question and with the nature and character of North Carolina jurors endows it with particular expertise in assessing how reasonable jurors would have understood these instructions in context. Its view is entitled to considerable deference in this limited situation. Accordingly, this case is wholly inappropriate for this Court's review.

B. The Instructions Provide No Method For Individualized Consideration of Mitigating Evidence.

From its analysis that respondent's jury could not reasonably have felt it had to agree unanimously to find a mitigating factor, petitioner leaps to the conclusion that the jury would have understood the instructions to allow individual jurors to weigh and consider any mitigating factors each individual juror found. Petition at 17-18. Nothing in the record, in logic, or in common sense supports this assertion. In truth, the instructions did not even hint that individual jurors remained free to consider mitigating evidence not found by the jury to support a mitigating circumstance in Issue Two. *Mills* recognized the illogic of this argument. "No instruction was given indicating what the jury should do if some but not all of the jurors were willing to recognize something about petitioner, his background, or the circumstances of the crime, as a mitigating factor." 486 U.S. at 379. Petitioner's new interpretation of this sentencing procedure

simply "appears out of the blue." *Mills v. State,* 310 Md. 33, 94, 527 A.2d 22, 33 (1987) (McAuliffe, J., dissenting), *rev'd,* 486 U.S. 367 (1988).

Common sense dictates that a jury assumes its decisions are to be made as a group, not individually, unless explicitly instructed otherwise. Jurors ordinarily do not make individual decisions in civil or criminal cases; verdicts are not rendered on an individual basis. As the North Carolina Supreme Court was keenly aware, when the *Kirkley* jury asked its question regarding whether it needed to be unanimous with respect to mitigation, it assumed that the jury as a group had to determine each mitigating circumstance. This assumption comports with reason and common sense. There is no basis for believing respondent's jury saw these instructions in a completely different way. Indeed, the revisions of the pattern jury instructions underscore the ambiguity in the use of the pronoun "you" in respondent's instructions. An individual juror may now weigh mitigation she finds supported by the evidence. To articulate this point clearly, the revised instructions refer to such individual determinations as those "that the juror" finds or "found by one or more of you." N.C.P.I. -- Crim. 150.10 at 34-35 (March 1990). The revised pattern instructions change or modify "you" to remove the ambiguity in instructions like those in this case and show the pronoun's singular use.

The weakness of petitioner's position is illustrated by the changes made in the North Carolina Pattern Jury Instructions for capital cases, promulgated in light of *McKoy*. When considering Issue Three, a capital jury is now told:

> If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. When deciding this issue, each juror may consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence in Issue II.

N.C.P.I. -- Crim. 150.10 at 34 (March 1990). Similarly, with respect to Issue Four, the jury is told to consider "the mitigating circumstance or circumstances found by one or more of you." *Id.* at 35. The instructions concerning Issue Four are noteworthy.

> In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances *found by one or more of you. When making this comparison, each juror may examine any mitigating circumstance or circumstances that juror determined to exist by a preponderance of the evidence.* After considering the totality of the aggravating and mitigating circumstances, each of you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue "Yes." In so doing, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. You may very properly give more weight to one circumstance than another. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination. You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances. After so doing, if you are satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty when considered with the mitigating circumstances *found by one or more of you*, it would be your duty to answer the issue "Yes." If you are not so satisfied or have a reasonable doubt, it would be your duty to answer the issue "No."

Id. at 35-36 (emphasis added). These changes in the pattern instructions provide an "additional bit of evidence about the natural interpretation of" the instructions and sentencing forms used by respondent's jury. *Mills*, 486 U.S. at 381.

> Although we are hesitant to infer too much about the prior verdict form from the Court of Appeals' well-meant efforts to remove ambiguity from the State's capital-sentencing scheme, we cannot avoid noticing the significant changes effected in instructions to the jury. We can and do infer from these changes at least *some* concern on the part of that court that juries could misunderstand the previous instructions as to unanimity and the consideration of mitigating evidence by individual jurors.

Id. at 382.

The revisions are also significant because they align North Carolina with other jurisdictions that seek to avoid any unconstitutionality by expressly allowing an individual juror to consider any mitigating evidence that she credits in her ultimate sentencing decision. It is illogical to think that respondent's jury would have understood the sentencing procedure allowed such individual consideration at Issue Three and Issue Four without any directions in the instructions to do so.

The only analysis petitioner offers rests on its interpretation of "you." According to petitioner, since this pronoun may be used individually or collectively, respondent's jury would have understood the instructions at Issue Three and Issue Four concerning mitigating circumstances "found by you" to mean "found by an individual juror," while the identical language, when applied to aggravating circumstances, would refer to the unanimous jury. Petition at 19. The lower court, applying *Boyde*, found a reasonable likelihood the jury would have understood the instructions in a different, unconstitutional way. *McNeil*, 327 N.C. at 393, 395 S.E.2d at 109-10; *see Boyde*, 494 U.S. at ____, 108 L.Ed.2d at 329. Its application of *Boyde* cannot be questioned simply by hypothesizing a plausible, constitutional interpretation. Rather, the constitutional interpretation must be the only reasonably likely one the jury could have gleaned from the instructions. *Id.*

Petitioner also argues the use of the pronoun "you" could be understood in its singular form. The use of the pronoun "you" is sufficiently ambiguous that respondent's jury reasonably understood it as referring to the jury as a whole. Significantly, the trial court never used the pronoun "you" to refer to individual jurors. The jury was impaneled with this pronoun used collectively; the trial court began his sentencing instructions using this pronoun collectively; the trial court addressed the jury collectively with this pronoun during its deliberations; and the trial court used the

pronoun collectively to frame each of the four sentencing issues. It used the pronoun "you" in this same, plural fashion throughout the trial, the instructions, and the penalty-phase issues.[1] The more plausible interpretation of the word "you" in Issue Two is its plural form.

The plausibility of the jury understanding the trial court using the pronoun "you" in its plural form is dramatically illustrated by the phraseology of the "catch-all" mitigating circumstance. *See* N.C. Gen. Stat. § 15A-2000(f)(9) (requiring the consideration of any additional mitigating factors found by the jury). When the trial court presented this option to respondent's jury on the issue sheets, it read: "Any other circumstances arising from the evidence which *you the jury* deem to have mitigating value." Appendix to Petition at A-49, A-53 (emphasis added). Thus, this written directive, the only instruction the jury had before it during the deliberations, plainly used "you" in its plural form to refer to all the jurors as a group.

Additionally, Issue Three and Issue Four in this case direct the jury to consider only mitigating circumstances "found by you." This language, identical to the language used to allow consideration of aggravating circumstances at Issue Three and Issue Four, plainly contemplates the jury making a group determination as to the existence of mitigating circumstances. A similar flaw existed in the Maryland procedure. The consideration of mitigation in the balancing stage was limited to those circumstances

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[1] Interpreting the meaning of the pronoun "you" by reference to its general use in the trial court's instructions follows general axioms of language construction. Analogously, well-settled notions of statutory construction direct that any ambiguity as to the meaning of a word used several times is resolved by assuming it means the same thing throughout the statute. 2A Sutherland, Statutes and Statutory Construction § 46.16 at 161 (Sands 4th ed. 1984); *see Kifer v. Liberty Mutual Insurance Co.*, 777 F.2d 1325 (8th Cir. 1985); *Boriack v. Boriack*, 541 S.W.2d 237 (Tex. Civ. App. 1976). "[T]here is nothing in the context which suggests the necessity for a departure from the ordinary rule of construction requiring that the same meaning shall be given to a term whenever used in the same act . . . ." *Wells v. Housing Authority of Wilmington*, 213 N.C. 744, 751, 197 S.E. 693, 697-98 (1938). If the trial court had intended to use the pronoun "you" in its singular sense, it would have said so. Since it did not, one must assume he intended it to be taken as a collective reference to the jury as a whole.

marked in a particular fashion at an earlier step. "Any mitigating circumstance not so marked, even if not unanimously rejected, could not be considered by any juror." *Mills*, 486 U.S. at 380. That earlier determination "would prevent those jurors who thought [particular evidence] was relevant to the ultimate sentencing decision from giving that mitigating circumstance any weight." *Id.* at 380 n.14.

In summary, respondent's jury is reasonably likely to have understood the sentencing procedure as requiring it to agree unanimously before a mitigating circumstance could be found and considered. At the very least, it would have understood that the jury as a whole needed to find a mitigating circumstance before that circumstance (and any evidence supporting it) could be considered by a juror in her ultimate sentencing decision.

C. No Split of Authority Exists Among the Jurisdictions on this Question.

As a final plea for review by this Court, petitioner claims various courts have applied *Mills* and *McKoy* in a fashion inconsistent with the court below. Petition at 19-22. In doing so, petitioner ignores the great dissimilarities among the applicable state capital punishment schemes. Most, if not all, of those jurisdictions have no step in this capital sentencing procedures analogous to Issue Two in North Carolina. Pennsylvania does not require a capital sentencing jury to determine the existence of mitigating circumstances. *Commonwealth v. Carpenter*, 511 Pa. 429, 444, 515 A.2d 531, 539 (1986). Since findings similar to North Carolina's Issue Two are not required, a Pennsylvania jury cannot be misled into believing unanimity is required to find mitigation. *Commonwealth v. Frey*, 520 Pa. 338, 347, 554 A.2d 27, 31 (1989). The state's reliance on *Frey*, therefore, is grossly misplaced.

Additionally, in Colorado, only two issues are submitted to the sentencing jury and neither requires the jury to determine whether mitigating factors have been proved. The jury is explicitly instructed to consider all mitigating evidence in the sentencing decision. *See People v. Rodriquez*, 794 P.2d 965 (Colo. 1990); *People v. Davis*, 794 P.2d 159 (1990). Neither of these cases are inconsistent or in conflict with the court below regarding either *Mills* or *McKoy*.

Similarly, the instructions used in South Carolina have no step similar to Issue Two. No findings of mitigating circumstances are required. Trial Transcript at 1441-57, *State v. Patterson*, 384 S.E.2d 699 (S.C. 1989).[2] In *Patterson*, the trial court "clearly charged the jury it could consider any mitigating factor and could recommend life for no reason at all. Nothing in the charge insinuate[d] life could be given only upon a unanimous finding of a mitigating circumstance." 384 S.E.2d at 703. Furthermore, Patterson's jury received explicit instructions that individual jurors could consider any statutory or non-statutory mitigating circumstances supported by the evidence in their deliberations. Trial Transcript at 1459, *id*; *accord State v. Green*, 392 S.E.2d 157 (S.C. 1990).

Petitioner also curiously relies upon cases from New Mexico to suggest a split among the jurisdictions. Petition at 21. New Mexico uses a pattern jury instruction that does not require a jury to make findings about mitigating circumstances. It provides: "If you find an aggravating circumstance, you must consider all mitigating circumstances." *State v. Clark*, 772 P.2d 322, 343 (N.M.), *cert. denied*, 110 S.Ct. 291 (1989). Obviously, such language allows the full consideration of mitigation by individual jurors. A New Mexico capital jury, unlike respondent's jury, is not required to make "findings" in mitigation. The state's reference to *Clark* is very misleading.

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[2] A copy of the sentencing phase jury instructions in *Patterson* is attached hereto in the Appendix.

Likewise, petitioner's reference to a federal district court decision from the Sixth Circuit is of no moment. The decision involved a capital sentencing from Kentucky and no step like North Carolina's Issue Two is used. *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1108-09 & n.7 (6th Cir. 1990) (*en banc*); *see* K.R.S. § 532.025(3).

Petitioner also asserts a division based upon cases from Alabama and Missouri. Petition at 20-21. In Alabama, however, the jury could not understand ambiguous instructions to require unanimous agreement on mitigation not only because the jury does not find these factors, but also because the jury verdict itself need not be unanimous. *See Ex parte Martin*, 568 So.2d 496 (Ala. Cr. App.), *cert. denied*, 110 S.Ct. 419 (1989). Furthermore, the jury's sentencing recommendation is merely advisory; the judge imposes the punishment. *Id.* Missouri is also unlike North Carolina. The sentencing jury is instructed it may return a life sentence for any reason at all. Jurors are also told "you must consider *all* circumstances in deciding whether to assess and declare the punishment is death." *State v. Petary*, 790 S.W.2d 243, 244-45 (Mo. Banc), *cert. denied*, ____ U.S. ____, 112 L.Ed.2d 426 (1990).

This review of the purported "conflict" between *McNeil* and the decisions of other jurisdictions demonstrates it is illusory and non-existent. Furthermore, it illustrates the unworthiness of this case for review by certiorari. The capital punishment schemes are vastly different and the sentencing instructions involved are not sufficiently similar to warrant this Court's review. The state simply fails to recognize how the disparity in the sentencing procedures, particularly where the jury as a unit never required to find specific mitigating factors, calls for varying applications of *Mills* and *McKoy*. Quite simply, there is no conflict that calls for this Court's resolution.

CONCLUSION

For the reasons stated herein, respondent respectfully requests that the Petition for Writ of Certiorari be denied.

This the 1st day of March, 1991.

Respectfully submitted,

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what Dot Shealy retyped during the lunch break. I will leave it right here on the desk.

You gentlemen both have done your duties I think exceptionally -- you have done all you could. You have done a good job, both sides. When you do that, that's all anybody can do.

(The following takes place after the recess and before the jury is returned to the courtroom.)

THE COURT: Let me ask, for the record, have you looked over the forms, the statutory instructions?

MR. DELGADO: Yes, sir.

THE COURT: Let me ask just for housecleaning, did you give your requests to charge to them?

MR. MYERS: Yes, sir.

THE COURT: Bring the jury back.

(The jury is returned to the courtroom.)

THE COURT: Madam Foreman and members of the jury, under the Constitution and laws of South Carolina, you are the finde of the facts in this case. I do not have the right to pass upon the facts or even to express any opinion I might have as to them, nor may I intimate in any way what I may think about the guilt or innocence of the defendant. You are also the judges and the sole judges of the credibility, the believa bility of the witnesses who have testified in this case. In passing upon their credidibility you may take into considera- tion many things, such as - one, the demeanor or manner of

testifying; two, whether a witness has reason to be biased or prejudiced; three, whether a witness's testimony was contradicted on the one hand or supported and corroborated on the other hand. You certainly do not determine the credibility or believability by counting the number of witnesses for either side. You may believe a small portion of a witness's testimony and disregard the larger or vice versa. You may believe one witness against many or many against one. All these things you will consider, bearing in mind that you should give the defendant the benefit of every reasonable doubt.

Now by the same Constitution and law which makes you the finders of facts and evidence as I have discussed with you, I am, as the judge, made the sole and only instructor in the law. You must accept as correct the law which I charge you and to apply it to the evidence as you find it and reach your verdict. In this case today you must accept the law as I charge it to you. I charge you in this regard that neither or I should be concerned about what the law ought to be, but only what I charge you the law to be.

Madam Forelady and members of the jury, it now becomes your duty to decide what sentence this Court will impose on the defendant, Raymond Patterson, Jr. There are two sentences or verdicts you are to consider in this case. One is the death penalty, which in this State is by electrocution;

and the other is life imprisonment. The order in which I explain these two sentences is in no way a recommendation by this Court as to which sentence you should consider -- excuse me, which sentence you should recommend. It is simply that one must be stated first. Also remember that, although I use the term, recommend, the defendant will actually be sentenced to whatever is recommended by you.

First, the death penalty. And I hold up the form here which is the death penalty form. You will have that in the jury room with you, along with other forms. By this recommendation of sentence form, which I hold in my hand, you, the jury, may recommend that this Court sentence the defendant to death. And I will do so. Please observe that immediately below this part of the recommendation there are twelve lines. Should you decide to recommend the death penalty, this is where each of you would sign your name. It is the law in this State that a recommendation for imposition of the death penalty be a unanimous recommendation and that each and every juror must agree and sign his or her name to the recommendation form.

I will now read to you the text of this form. And it goes on to say, "We, the jury in the above entitled case, having found a reasonable doubt"-- having found -- excuse me. That's wrong. I will start again. "We, the jury in the above entitled case, having found beyond a reasonable doubt the existence of the following statutory aggravating circumstance or

circumstances, to wit: (a blank which you could fill in that aggravating circumstance, if that be your verdict), now recommend to the Court that the defendant, Raymond Patterson, Jr., be sentenced to death." At this point there is a place for you to write the circumstances, as I said, about which I will tell you more later as we get into the discussion.

Again, I want to emphasize in reading the order means absolutely nothing, other than you have got to start one place or the other. I am not in any way giving anything; this is just a form in which it's followed and means nothing.

"now recommend the defendant Raymond Patterson be sentenced to death."

Now I will read next to you the statutory aggravating circumstances, if you find that way.

Now for this recommendation to be made, that is the form I just read, that the defendant be sentenced to death, you must first find that the defendant committed the murder and that the statutory aggravating circumstances existed beyond a reasonable doubt. Now I want to further tell you you have heard evidence in this proceeding of prior convictions and bad acts by the defendant. I tell you that these are not and may not be used as proof of the statutory aggravating circumstances of armed robbery. These may be considered by you only in reference to the character of the defendant and for no other purpose. This information may be considered by you

and given whatever weight, if any, you feel it should have. Do you understand?

I charge you that it is a vital, important rule of the law of evidence that the defendant in a criminal trial, no matter how great or serious may be the offense with which he is charged, must always be presumed to be innocent until his guilt has been proved beyond a reasonable doubt. This presumption remains with the defendant throughout the trial and until the jury has, upon the testimony and the evidence presented, found guilty beyond a reasonable doubt. In this trial it is the solemn duty of you, the jury, if not clearly and unanimously convinced beyond every reasonable doubt that the murder was committed while in the commission of a statutory aggravating circumstance to recommend life imprisonment. As I have stated, the burden of proof is upon the State to prove the guilt of the defendant beyond a reasonable doubt. And it is required that each and every element of the offense or act charged be proved beyond a reasonable doubt. The defendant is entitled to any reasonable doubt. If you have a reasonable doubt as to the guilt of the defendant, he is entitled to that doubt and would be entitled to a sentence of life in prison.

When I use the term, reasonable doubt, I mean by that a sound and sensible doubt, a doubt for which you can give a reason. It is a doubt that leaves the mind of a fair and

impartial juror in a wavering and unsettled condition after he or she has fairly considered all of the testimony and evidence in a case. You, alone, must make the determination of whether or not such a doubt exists in this case.

Now I charge you as to evidence, this part. Well, I will give that a little bit later, on second thought.

Now another jury's verdict was of no consequence to -- now, what another jury's verdict was is of no consequence to you. This is a new case and it is your case. And you don't consider the last case. What another jury did is not to enter into your discussions or deliberations in any manner whatsoever You are here to make your own decision based upon the evidence here before you in this trial and on no other basis. Please remember this because it is very important. The decision in this case is to be yours and yours alone and no one else's.

As I told you earlier, every criminal defendant is presumed to be innocent of all the charges and allegations brought against him. This presumption is like a protective shield which surrounds the defendant and protects him unless and until sufficient evidence is produced to convince you of his guilt beyond a reasonable doubt.

I charge you that the burden of producing sufficient evidence to remove this shield is completely upon the State. A criminal defendant never has the burden of proving that he is innocent.

I am going to charge you about two kinds of evidence, as a basic part of the charge. I now charge you that evidence may be of two kinds, direct or circumstantial. By the term, direct evidence, the law means the testimony of persons who have perceived its existence by means of their senses, as where a person sees a crime committed and comes in to court and testifies as to what he saw. Indirect or circumstantial evidence, on the other hand, means the proof of some other fact or facts from which taken either singly or collectively the existence of the particular fact in question may be inferred as a necessary consequence. Crime may be proved by circumstantial evidence as well as by direct testimony of eye witnesses. Circumstantial evidence is permissible provided it meets the legal test. To the extent that the State relies on circumstantial evidence, it must prove all the circumstances relied on beyond a reasonable doubt. They must be wholly and in every particular perfectly consistent with one another and they must point conclusively, that is to a moral certainty, to the guilt of the accused to the exclusion of every other reasonable hypothesis. In other words, circumstances must be absolutely inconsistent with any other reasonable hypothesis than the guilt of the accused. In the consideration of circumstantial evidence you must seek some other reasonable explanation thereof, other than the guilt of the accused. And if such reasonable explanation can be found, you cannot convict

on such -- and if such reasonable explanation can be found, you cannot convict on such evidence.

What is murder?, next. Well, murder may be defined as the willful and felonious killing of a human being by a human being with malice aforethought, that malice being either expressed or implied. In order to prove a person guilty of murder, the State must not only prove that the deceased was killed by the defendant, but it must also prove beyond a reasonable doubt that the killing was done with malice aforethought. Malice is a word suggesting wickedness, hatred, and a determination to do what one knows to be wrong without just cause, excuse, or legal provocation. What do we mean by aforethought? It means that malice need not be in the mind of the one doing the killing for any particular length of time before the act of killing in order to render the killing murder. If it is present in the mind doing the killing any length of time before the act, then its presence would be sufficient to render the killing murder. Malice is said to be expressed where there is manifested a violent, deliberate intention to unlawfully take away the life of another human being. Malice is implied where one intentionally and deliberately does an unlawful act which he or she then knows to be wrong and in violation of his or her duty to another and where no excuse of legal provocation appears and when the circumstance attending the killing show an abandoned heart, a

malignant heart fatally bent upon mischief. If the evidence should show under the circumstances a shot was fired or a blow delivered which took the life of another, then you, the jury, would have to determine whether under such circumstances the act was malicious. The law says if one intentionally kills another with a deadly weapon the implication of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you along with other evidence in the case and you may give it such weight as you determine it should receive.

In South Carolina a deadly weapon includes any article, instrument, or substance likely to cause death or great bodily harm.

Now, ladies and gentlemen, to repeat, as I told you, in order for you to recommend that this defendant be sentenced to death you must first find the defendant committed this murder and that a statutory aggravating circumstance existed beyond a reasonable doubt.

What is a statutory aggravating circumstance? It is a fact, an incident, a detail or an occurrence which the General Assembly has declared by the Statute could make worse -- has declared by Statute could make worse, that is aggravate, the offense of murder when the two occur together. In other

words, it is something which may increase the enormity or add to the injurious consequences of the offense.

Now, I am going to hold up here what is known as statutory instructions. You see it now in my hand and it will be given to you when you go to your jury room. Upon this sheet of paper I hold in my hand are written the statutory instructions. You have this paper in your jury room, you will have it in your jury room during the deliberations. The body of this form states: "In determing whether to recommend the defendant, Raymond Patterson, to be sentenced by the Court to life imprisonment or to death, you may consider the following statutory aggravating circumstances. One, the murder was committed while in the commission of robbery while armed with a deadly weapon."

I have already told you and you have heard in the evidence of this proceeding of other convictions or bad acts by the defendant. But I tell you again that these are not used as proof of statutory aggravating circumstance of armed robbery. These may be considered only in reference to the character of the defendant and for no other purpose. This information may be considered by you and given whatever weight, if any, you feel it should have. The only one here as to commission is at the time of the murder, if you find murder took place, the armed robbery charge as to only the one instance involved. Let me emphasize to you that these are only circumstances you

may consider as this -- let me emphasize to you that these or this is the only circumstance, one, armed robbery while armed with a deadly weapon, that you may consider as aggravating circumstance. Should you find, and it must be a unanimous finding, that this is a finding by each and every one of you that the State has proven beyond every reasonable doubt the existence of the circumstance listed on this sheet of paper, that is statutory instructions, then you would be authorized which is to day permitted to consider recommending to this Court that the defendnt be sentenced to death. In other words, the State must prove to each and every one of you to your satisfaction and beyond any reasonable doubt that the murder was committed by the defendant while in the commission of armed robbery, while armed with the use of a deadly weapon. That is, while in the commission of the crime.

In order to find the aggravating circumstance listed above, you must find beyond a reasonable doubt that the murder was committed while in the commission of the armed robbery while armed with a deadly weapon. The phrase, while in the commission of, means that the crime was committed, consummated in a continuous series of acts with the murder, that it was committed in the same place and it was not separate and any substantial lapse of time.

I am not going to describe to you what is armed robbery. Robbery is the taking and carrying away of the personal

property of another from his or her person or in his or her presence by violence or by putting that person in fear. Robbery includes larcency, which you would ordinarily call stealing, and all of the elements which are necessary to constitute stealing or larcency are necessary to constitute robbery. In addition, the stealing must have been accomplished by violence or by putting the person having possession of the property in fear. To establish the offense of robbery it is necessary for the State to show: One, that the personal property of another has been taken; two, after being taken, it was carried away; three, the taking and carrying away was with the intent of depriving the owner of it; four, the property was taken from the person of another or in his or her possession; five, the taking was without the consent of the owner; and, six, the taking was accomplished with violence or by putting the person in fear. There is an additional element that the State must prove in this case and that element is that the robbery must have been committed with a deadly weapon. Armed robbery is the felonious taking and carrying away of the personal goods of another from his or her person or in his or her presence by violence or by putting in fear, having and using a deadly weapon to obtain the possession of the property, or putting the person in fear to obtain it. A deadly weapon is a term used in the law just stated to you means any weapon, instrument or object that is capable of being used to inflict great bodily

injury or death.

Please pay particular attention to this. You are never required to recommend the death penalty, even if you find tha the murder was committed while in the commission of armed robbery with the use of a deadly weapon, these being -- this being the statutory aggravating circumstance alleged by the State. In other words, you could still recommend a life sentence, even if you find beyond a reasonable doubt that the statutory aggravating circumstance was present at the time of the murder. I instruct you further that should you find that the State has not proven beyond a reasonable doubt the statutory aggravating circumstance alleged, that is armed robbery with the use of a deadly weapon, then you would not be authorized to recommend the death penalty and your recommendation must be life imprisonment. I would further tell you that, should the State prove beyond a reasonable doubt the existence of a statutory aggravating circumstance which would be sufficient to authorize you to recommend death but the defendant introduces evidence of a mitigating circumstance or circumstances, and you may recommend life imprisonment. I will tell you more about that in a minute. Now, should you find beyond a reasonable doubt that the murder was committed by the defendant and while in the commission of the aggravating circumstance listed on this sheet of paper as statutory instructions, and should you then decide, after fully considering

everything about which I will instruct you in a moment in regard to life imprisonment, that the unanimous recommendation of the jury is to be that the defendant be sentenced to death, then it would be your duty, Madam Forelady -- then it would be your duty, Madam Forelady, to write on the recommendation of sentence form (holding up the form) the statutory aggravating circumstance. That is on the form as to recommendation of death penalty, where you fill in the aggravating circumstance, if that be your finding pursuant to all the instructions I have given you that will follow, which you have found. Then, Madam Forelady, you and each and every jury would sign your name in the place provided. Do you understand? In other words, if the recommendation is for death, then each would have to sign. Not only yourself, but everybody.

Now, life imprisonment. Now we have talked about the death penalty. Now we are going to discuss life imprisonment. And I am going to hold up the form that -- this is the form, recommendation of sentence for life imprisonment. And you will have this form. So you will have three forms in the jury room with you. I tell you first that life imprisonment is to be understood in its ordinary and plain meaning. By this form I hold in my hand you, the jury, can recommend to this Court that the defendant be sentenced to life in prison even if you find the aggravating circumstance beyond a reasonable doubt. I will not read you the text of this recommmendati

form, that is to life imprisonment. It says, "We, the jury in the above entitled case, recommend to the Court that the defendant, Raymond Patterson, Jr., be sentenced to life in prison." And a line for you to sign, Madam Forelady. Please don't, although you must unanimously agree to recommend life imprisonment, only the forelady is required to sign this recommendation form.

I will now instruct you on what you may consider in making your decision as to which sentence to recommend. As I previously instructed, if you find the existence beyond a reasonabl doubt of a statutory aggravating circumstance, then you are permitted, but not required, to recommend the death penalty. There are three conditions which you should consider in reaching your decision. One, first that the defendant was proven by -- first, whether the defendant has proven by any evidence the existence of a statutory mitigating circumstance. Second, whether the defendant has proven by any evidence the existence of any other mitigating circumstances, non statutory. Third, whether for any reason you can think of, or for no reason at all, the defendant should be sentenced to life in prison.

First, I will address the subject of statutory mitigating circumstances. What is statutory mitigating circumstance? It is a fact, an incident, a detail, or an occurrence which the General Assembly has declared by the Statute would reduce

the severity of the offense of murder. In other words, it is a circumstance recognized by the Statute as one which in fairness and mercy may be considered as extenuating or reducin the degree of moral culpability for the commission of the act of murder. A mitigating circumstance is neither justification nor excuse for the murder. It simply lessens the degree of one's moral culpability or tends to make him less blame worthy. What statutory mitigating circumstances should you consider in this case? And I hold up, again, the form initially discussed where we have both aggravating and statutor circumstances listed for your consideration. I refer once again to this sheet of paper entitled Statutory Instructions, so entitled at the top. Immediately below the listing of statutory aggravating circumstances, which I read to you earlier, the text continues. "You may also consider the following statutory mitigating circumstances: One, that the defendant, Raymond Patterson, Jr., has no significant history of prior criminal convictions involving the use of violence against another person. Two, the age of the defendant at the time of the crime." You may also consider any non statutory mitigating circumstance. A non statutory mitigating circumstance is one which is not provided by Statute but is one which the defendant claims serves the same purpose, that is to reduce the degree of his moral culpability of blameworthiness. The mitigating circumstance which I have read, or circumstances

which I have read for your consideration and which you will have in the jury room are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence upon the defendant You should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstance relating to the case or to the defendant, Raymond Patterson, Jr., as reasons for not imposing the death sentence. In other words, you may in your good judgment impose a life sentence for any reason at all that you see fit to consider or for no reason at all and you need not find a mitigating circumstance at all to impose a life sentence. While there must be some evidence which supports a finding by you that a statuatory or non statutory mitigating circumstance exists, you need not find the existence of such a circumstance beyond a reasonable doubt. In reaching your decision as to whether the sentence to recommend, you will consider the aggravating and mitigating circumstances. While an aggravating circumstance must be found before you can even consider recommending the death penalty, once such a finding is made beyond a reasonable doubt, you may recommend the death sentence even though you find existence of a

mitigating circumstance. In other words, existence of a mitigating circumstance does not keep you from imposing the death penalty. Finally, if you should conclude that a statutory aggravating circumstance exists, you may consider whether the defendant, Raymond Patterson, should be considered to life imprisonment for any reason or for no reason at all. That is what has been referred to as a recommendation of mercy. And should that be your decision, you would indicate by returning to the Court the recommendation of life imprisonment, which I have just shown you the form, which will be signe by you, Madam Foreman or Forelady, alone. In other words, you may choose to recommend life imprisonment, if you find a statutory or non statutory mitigating circumstance, or you may choose to recommend life imprisonment as an act of mercy. In any instance, should you choose to recommend life imprisonment, your decision must be a unanimous one and the forelady alone would be required to sign the recommendation form.

Now I am going to say in summary, again, what I have said.

I will now summarize what I have just told you. You will have in the jury room during the deliberations three forms. One, Recommendation of Life Imprisonment Form; two, Recommendation of Death Penalty Form;
three, Statutory Instructions. The Statutory Instructions state the only aggravating circumstance you shall consider in

this case. Should you fail to unanimously find beyond a reasonable doubt that the murder was committed while in the commission of armed robbery with the use of a deadly weapon, then you would go no further and your recommendation must be for life in prison. Should you unanimously find beyond a reasonable doubt the existence of an aggravating circumstance, you would then be authorized to consider recommending the death penalty. In your deliberations you will consider any statutory or non statutory mitigating circumstances which are supported by the evidence. You will consider the aggravating circumstances you have found against the mitigating circumstances. And you will then decide whether you will recommend the death penalty or recommend life imprisonment. You may also consider any other factors in mitigation or the offense. And you can recommend a sentence of life imprisonment for no reason at all. If you decide to recommend the death penalty, you will complete the proper form, which I've just discussed. You must write out the aggravating circumstances you have found, as I have instructed you. And all twelve jurors must sign the recommendation. Should you decide to recommend life imprisonment, only the forelady must sign the recommendation and no reason is to be given for your decision. Whatever your recommendation is, it must be a unanimous one. That is to say it must be the verdict of each and every juror.

Now in the way of final instructions. In considering

whether to recommend life imprisonment or the death penalty for the defendant, Raymond Patterson, Jr., I charge you that, as jurors, you must decide the issue involved in this proceeding without bias, without prejudice to any party. You cannot allow yourselves to be governed by prejudice, by passion, or by public opinion. Both the State and the defendant have the right to expect that each of you will carefully and impartially consider all the evidence in the case and that you will follow the law, as I have explained it to you.

At this time, ladies and gentlemen, I will ask the alternate juror to stand aside, if all twelve of you are feeling good. All of you look good. Are all of you feeling good? I am going to ask the alternate juror, if she will -- we thank you for service and, if you will, come out here and just have a seat right up here and we will talk to you a little bit later.

Is everybody feeling good? Because nobody can be excused now until the verdict is rendered. Okay.

However, I want say this. The rest of you are going to retire to your jury room. However, do not begin your deliberations until I send word for you to do so. I have some matters to take up with the attorneys and I may have to call you back into the courtroom. You may retire to your jury room, but as I say, do not begin your deliberations at this point in time. Now, you are going to have in your jury room with you all of

NO. 90-968

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

****

STATE OF NORTH CAROLINA,

Petitioner,

v.

LEROY McNEIL,

Respondent.

****

CERTIFICATE OF SERVICE

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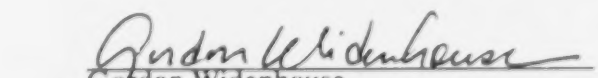
I, Milton Gordon Widenhouse, Jr., a member of the bar of the Supreme Court of North Carolina and a member of the bar of this Court, hereby certify that on the 1st day of March 1991, one copy of the Respondent's Brief in Opposition and Respondent's Request to Proceed *in forma pauperis* in the above entitled case were served upon Mr. Barry S. McNeill, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, counsel for the Petitioner therein, by first-class mail, postage prepaid. I further certify that all parties required to be served have been served.

This the 1st day of March, 1991.

Respectfully submitted,



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